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No. 00-1402

In The

Supreme Court of the United States

INTERNATIONAL FIDELITY INSURANCE CO., INC.,

Petitioner,

v.

DRILL SOUTH, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT DRILL SOUTH, INC.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a Miller Act surety who is a party to a lawsuit against its principal, is a privy of that principal, and has notice and the opportunity to defend that principal, is bound by a default judgment against the principal?

PARTIES TO THE PROCEEDING

Petitioner is International Fidelity Insurance Company. Respondent is Drill South, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Drill South, Inc. states that it is a privately owned company, has no parent company, and no publicly held company owns 10% or more of its stock.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Drill South, Inc. ("Drill South") respectfully submits that the decision below correctly analyzed the facts and applied governing law, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

STATEMENT OF THE CASE

The controlling facts are set forth in detail in the opinions of the District Court and the Court of Appeals. App. 1a – 33a. Because the Petition omits several determinative facts, Drill South provides the following supplemental statement as required by Supreme Court Rule 15.2.

Enviro-Group entered into an Agreement of Indemnity with International Fidelity Insurance Company ("IFIC"). That Agreement afforded IFIC extensive rights in the event a claim was asserted against the Miller Act bond at issue here, including the "right to adjust, settle, or compromise any claim, demand, suit or judgment upon the [payment bond]." App. 6a. The Agreement designated IFIC as Enviro-Group's "attorney-in-fact," and gave IFIC the legal right to step in and defend Enviro-Group against the default judgment. *Id.*

IFIC had numerous opportunities to exercise its rights under the Agreement of Indemnity, and to proffer a defense on behalf of Enviro-Group, including: (1) the opportunity to file a response to Drill South's motion for default judgment; (2) the opportunity to appear and be

heard in April 1997 on "the issues of entry of the default judgment against Enviro-Group, any damages arising therefrom, and whether such default judgment is binding on [IFIC] as a surety;" (3) the opportunity to file a post-hearing brief on the issues raised at the April hearing; and (4) the opportunity to argue before the District Court at a motion docket prior to entry of judgment against it. App. 5a – 6a n.3.

ARGUMENT

I. IFIC HAD NOTICE AND THE OPPORTUNITY TO DEFEND, AND THEREFORE RECEIVED DUE PROCESS.

This Court previously explained what "due process" requires where a party seeks to bind another by a judgment:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950) (citations omitted).

IFIC received due process because it had notice and the opportunity to defend against the default judgment against its principal. The Eleventh Circuit rejected IFIC's due process claim because it found the "record is replete with instances in which the district court afforded [IFIC] both notice and opportunity to step in and defend the merits of Drill South's claims against Enviro-Group and the extent of its liability." App. 5a.

II. THE ELEVENTH CIRCUIT PROPERLY APPLIED PRIOR DECISIONAL LAW

A. Federal Law

1. IFIC is Bound Under the "Notice and Opportunity to Defend" Standard Established by Federal Law

The Eleventh Circuit applied federal decisional law in holding that a Miller Act surety with notice and the opportunity to defend its principal is bound by a default judgment against that principal. The Eleventh Circuit recognized that individual states have different rules concerning the effect on a surety of a default judgment against its principal,[3] but relied upon prior binding Fifth Circuit precedent for its decision. App. 4a – 5a, 8a – 9a.

Federal decisional law provides that a surety is bound by a default judgment against its principal if it had

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[3] The decisional law concerning the effect on a surety of a default judgment against its principal is surveyed in *Ohio Casualty Ins. Co. v. Kentucky Natural Resources & Envtl. Protection Cabinet*, 711 S.W.2d 860 (Ky. App. 1986).

notice and the opportunity to defend against that judgment:

> Where it appears that the judgment against the [principal] was obtained in a suit of which the surety had full knowledge, and which it had full opportunity to defend, the judgment therein is not only evidence, but conclusive evidence, against every defense except that of fraud and collusion in obtaining it.

Lake County ex rel. Baxley v. Massachusetts Bonding & Ins. Co., 75 F.2d 6, 8 (5th Cir. 1935) (state payment bond). *See also Frederick v. United States*, 386 F.2d 481, 485 n.6 (5th Cir. 1967) ("A judgment against a principal conclusively establishes against a surety the fact of, and amount of, the principal's liability, except against defenses of fraud or collusion, if obtained in a suit of which surety had full knowledge and opportunity to defend."); *United States ex rel. Vigilanti v. Pfeiffer-Neumeyer Constr. Corp.*, 25 F.Supp. 403, 404 (E.D.N.Y. 1938) ("Where the judgment sought to be offered in evidence was procured in an action of which the surety had full knowledge, and which it had full opportunity to defend but failed to do so, the judgment in that action is conclusive evidence against the [surety], except the defense of collusion and fraud in obtaining it.").

Here, IFIC had both notice and the opportunity to defend its principal against the default judgment. As explained by the Eleventh Circuit and the District Court, IFIC's Agreement of Indemnity afforded IFIC the right to present a defense on behalf of Enviro-Group, but IFIC chose not to avail itself of that right. App. 5a – 8a, 26a – 33a. Consequently, the Eleventh Circuit and the District Court

correctly concluded that IFIC is bound by the default judgment.

2. The Decision Below Does Not Conflict With Prior Federal Decisions

IFIC contends that the Eleventh Circuit misinterpreted federal law, and thereby created a conflict with prior binding decisions of that Court. Specifically, IFIC contends that the "notice and opportunity to defend" standard conflicts with a general rule that default judgments are not entitled to preclusive effect. (pp. 12-14, Petition). But the alleged conflict is illusory, because the "notice and opportunity to defend" standard is the functional equivalent of "a fair opportunity procedurally, substantively and evidentially to contest the issue" – the standard applied in determining whether collateral estoppel arises from a default judgment. *See In re Bush*, 62 F.3d 1319, 1323 (11th Cir. 1995) (citations omitted).

IFIC's assertion of a conflict with decisions of the Ninth Circuit is also without merit. (pp. 11-12, Petition). The "notice and opportunity to defend" standard is entirely consistent with Ninth Circuit decisional law. For example, in *United States ex rel. Aurora Painting, Inc. v. Fireman's Fund Ins. Co.*, 832 F.2d 1150 (9th Cir. 1987), the Ninth Circuit affirmed a decision which held a Miller Act surety preclusively bound by a state court judgment confirming an arbitration award against its principal. The Court rejected the surety's argument that it was not bound by the arbitration award because it was not a party to the arbitration or confirmation proceedings:

> Normally, a judgment against a principal conclusively establishes against a surety the fact of and the amount of the principal's liability as long as the surety has notice of the proceeding against the principal.

Id. at 1153 (citing *Frederick v. United States*, 386 F.2d 481, 485 n.6 (5th Cir. 1967)). Once again, that is the functional equivalent of the "notice and opportunity to defend" standard applied by the Eleventh Circuit.

The Eleventh Circuit properly applied prior federal precedent to hold IFIC bound by the judgment against its principal where it had notice and the opportunity to defend its principal against that judgment.

B. Alabama Law

1. IFIC is Bound Under the "Party or Privy" Standard Established by Alabama Law

Although the Eleventh Circuit applied federal law in deciding this Miller Act case, it explained that IFIC would be equally bound by the default judgment against its principal under Alabama substantive law. App. 7a n.5. Under Alabama law, a surety is preclusively bound by a default judgment rendered against its principal if the surety is a privy of the principal or is a party to the action in which the judgment is rendered. *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147, 167-68 (1856). Because IFIC is Enviro-Group's privy and was a party to the action in which the default judgment was rendered, IFIC is preclusively bound by the default judgment under Alabama law. App. 7a n.5.

On appeal, IFIC did not contest the District Court's finding that IFIC is Enviro-Group's privy, App. 29a, and is therefore barred from raising that issue now. *E.E.O.C. v. Fed'l Labor Relations Auth.*, 476 U.S. 19, 24 (1986). Consequently, even if the Eleventh Circuit erred in applying federal law, that error is harmless because IFIC is bound by the judgment against its principal under Alabama law.

2. The Decision Below Does Not Conflict With Prior Alabama Law Decisions

Once again, IFIC asserts the existence of conflict with prior decisions (pp. 7-11, Petition) where no such conflict exists.

First, IFIC contends that the sureties in *United States v. Maryland Casualty Co.*, 204 F.2d 912 (5th Cir. 1953), were not bound by the default judgment because the bonds "were not undertakings to be bound by a judgment." (p. 8, Petition). However, the Fifth Circuit explained that the sureties in that case were not bound because the bonds at issue were not judgment bonds *and* because the sureties were neither the privies of the principals nor parties to the action in which the default judgment was rendered – recognizing that Alabama law holds a surety bound by a judgment against its principal if the surety is "either a party or a privy." *Maryland Casualty*, 204 F.2d at 915.[2]

Second, IFIC misrepresents the holding in *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147 (1856), by selectively

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[2] IFIC omits the crucial "party or privy" aspect of the *Maryland Casualty* decision from its Petition, just as it did in its submission to the District Court. *See* App. 28a.

quoting from the opinion. According to IFIC, "*Fireman's [sic] Ins.* states that 'the true rule is that a recovery against a principal cannot be used as evidence to charge a surety.' " (p. 9, Petition). That "rule" applies only where the surety is neither a party to the lawsuit nor a privy of its principal, as is evident when the language quoted by IFIC is read in context:

> The true rule is, that a recovery against the principal cannot be used as evidence to charge the surety, except in cases where the contract of the surety can be construed into an undertaking to be bound by the result of legal proceedings against the principal; and we apprehend, when the judgment is binding on the surety at all, it is conclusive and not merely *prima-facie* evidence. There is, in our opinion, no middle ground. *The surety is either a party, or privy, and bound by the judgment; or a stranger, and not bound.*

29 Ala. at 147 (emphasis added and citations omitted).

Here, IFIC was both party and privy, App. 28a – 29a, and bound by the judgment against its principal.

III. IFIC CONFUSES THE RIGHT TO DEFEND WITH THE OBLIGATION TO DEFEND

As the Eleventh Circuit explained, IFIC had the legal right to defend Enviro-Group against the default judgment. App. 5a – 8a. IFIC misreads the Eleventh Circuit's opinion as "impos[ing] an obligation upon the surety to defend its principal inconsistent with standard commercial practices in suretyship." (p. 17, Petition).

IFIC continues to erroneously equate a "right" with an "obligation," despite the Eleventh Circuit's careful explanation of the difference:

> To the extent that [IFIC] argues that it had no obligation to defend the action against Enviro-Group, we are not persuaded. We believe the issue is not whether the Agreement of Indemnity imposed an obligation on [IFIC] to defend Enviro-Group, but whether it conferred a right to defend. The law requires only that a surety have notice and an opportunity to defend before it is bound by a judgment against its principal. We believe [IFIC] had this right and opportunity, and simply chose, for whatever reason, not to exercise its right.

App. 7a – 8a (footnote omitted).

The Eleventh Circuit has not imposed an obligation on a surety to defend its principal, but rather has made clear that when a surety has the contractual right to defend but elects not to do so, it proceeds at its own peril.

CONCLUSION

The Petition fails to demonstrate any valid ground for review of the decision below, and should be denied.

Respectfully submitted,

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